Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CAPTAIN ADRIENNE M. HALL,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the military judge committed plain error by instructing the members about collateral consequences of a court-martial conviction.

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The petitioner, Captain Adrienne M. Hall, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in her case on 9 June 1997.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at *United States v. Hall*, 46 M.J. 145 (1997), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals (A.F. Ct. Crim. App., 17 June 1996) is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 9 June 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (West Supp. 1996) and 10 U.S.C. § 867(a)(3) (West Supp. 1996).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution of the United States provides, in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

On 18 August 1994, pursuant to her pleas, petitioner was convicted of the wrongful use of methamphetamine in violation of Article 112a of the Uniform Code of Military Justice. In their sentencing arguments before the panel of members, both trial and defense counsel focused on whether or not petitioner, a veteran of 19 years and 8 months, should be dismised from the service. Basically, a dismissal was all the Government asked for, Record 98; it was what the Defense argued most forcefully against. Record 100. After deliberating for more than an hour, the members returned to the courtroom with a question: "Should the accused be dismissed from the Air Force, what benefits would she be entitled to as a dependent?" Record 108; App. Ex. X. (This question was asked in reference to petitioner's husband being a retired Air Force officer. Record 108.) The question was hand-written on an otherwise blank sheet of paper, with no indications on it or in the record of any opportunity afforded either trial or defense counsel to review the question and note any objection they might have to it before the military judge replied:

> "The response to that is, her conviction by this court or any sentence imposed by this court, including a dismissal, would not affect any benefits she would be entitled to as a dependent of a retired military person. In other words, those might be use of commissary, use of BX, medical benefits, as any other dependent of a retired military person." Record 108.

Having answered the question with substantive information that appeared facially accurate, the military judge asked whether either counsel had "any quarrel with that point of view." Record 108. Both counsel replied in the negative. *Id.* Twenty-nine minutes later the members returned and announced their sentence: dismissal from the service. Record 109.

On 17 June 1996, the Air Force Court of Criminal Appeals affirmed the findings and sentence. App. B, *infra.* The court stated that [o]rdinarily, the appropriate remedy for a military judge faced with such a question is to simply affirm that 'collateral consequences are not germane' to the sentencing process," quoting *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988), cert. denied, 487 U.S. 1206 (1988). However, the court failed to find plain error as it found the military judge was essentially correct, and the trial defense counsel did not request additional instructions. On 8 January 1997, the United States Court of Appeals for the Armed Forces granted review of the decision of the Air Force Court of Criminal Appeals pursuant to 10 U.S.C. 867(a)(3). On 9 June 1997, the Court of Appeals for the Armed Forces affirmed the lower court's decision. The court ruled that the petitioner failed to satisfy her burden of showing that an obvious, substantial error occurred and that the error had an unfairly prejudicial impact on her case. *United States v. Hall*, 46 M.J. 145, 147 (1997).

REASON FOR GRANTING THE PETITION

"The general rule concerning collateral consequences of a sentence is that 'courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration.' " *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988), cert. denied, 487 U.S. 1206 (1988); quoting *United States v. Quesinberry*, 12 U.S.C.M.A. 609, 612, 31 C.M.R. 195, 198 (1962). While it is not necessarily error for a military judge to answer court members' questions on collateral consequences of particular sentences—

> "[m]ilitary judges must tread carefully when responding to a court member's question on such matters. Ordinarily, the appropriate reply is simply to affirm that 'collateral consequences are not germane' to the sentencing process. *Griffin*, 25 M.J. at 424. **With the accused's permission**, though, the judge may venture further. However, that path is fraught with hazards. The answer must be clear, despite the extemporaneity of the occasion. *Id.* It must also be accurate and complete. This is of particular concern, since military judges are less likely to be fully informed as to collateral consequences. *Griffin*, 25 M.J. at 425 (concurring opinion by Everett, C.J.). Finally, the potential for unnecessary confusion, resulting from inundating the members with administrative trivia, must be avoided. *Quesinberry*, 12 U.S.C.M.A. at 612, 31 C.M.R. at 198; *see* Mil. R. Evid. 403."

United States v. McLaren, 34 M.J. 926, 934 n.9 (A.F.C.M.R. 1992) (emphasis added), aff'd, 38 M.J. 112 (C.M.A. 1993), cert. denied, —— U.S. ——, 114 S.Ct. 1056 (1994).

Ignoring the appellate courts' repeated pronouncements that military judges should simply affirm that collateral consequences are not germane to members' sentencing

considerations, the military judge in the instant case proceeded *sua sponte* and **without the permission of the accused** to provide the members with a substantive response to their question on the collateral consequences of a dismissal vis-à-vis petitioner's dependent military benefits by virtue of her marital status. When a military judge contemplates providing the court with such information, he must obtain permision from the defense before doing so. The Court of Appeals for the Armed Forces has made this requirement emphatically known when it stated (in italics) that a military judge does not err in answering members' questions "*if an accused agrees.*" *Griffin, supra.*

In the instant case, after the military judge announced the members' question in open court, he answered it directly without first convening an Article 39(a) session or even inquiring as to any objections by counsel. Rules for Courts-Martial 801(c). Rather than follow the advice of *McLaren, supra*, to "tread carefully" in responding to such questions, the military judge answered the question. Only **thereafter** did the military judge ask counsel whether they had "any quarrel with that point of view."

Even this question was not one asking whether defense counsel thought the question should have been answered, the question asked whether counsel disagreed with the substantive correctness of the information provided to the members. That substance having, at that moment, been apparently correct (and the "bell having already been rung"), both counsel indicated that they had no "quarrel with that point of view."

What the judge didn't say is just as devastating as what he did. Having answered the substance of the members' question, the military judge failed to instruct them that this information was not to be taken into account in adjudging an appropriate sentence for petitioner. Cf. *United States v. McLaren*, 34 M.J. at 933 (military judge answers question and then concludes by saying "you can't

take that into consideration in adjudging what you believe to be an appropriate sentence.") As the Air Force Court noted in *McLaren, supra*, once a judge takes it upon himself to provide a collateral consequence instruction, his instruction thereon must be complete. Indeed, the *McLaren* Court closed its discussion of this issue by concluding that the judge's **explicit** guidance to not consider any extraneous matters was appropriate and adequate to preclude any improper consideration by the members. (emphasis added). *McLaren* at 934.

As a practical matter, the information conveyed to the members by the military judge was that if the members felt petitioner deserving of her military retirement benefits (i.e. medical care, use of the commissary and the base exchange), they needn't worry about a dismissal depriving her of them because she would still have access to such benefits as the dependent of a military retiree. The impropriety of considering a similar type of collateral information was addresed in *United States v. Cleckley*, 8 U.S.C.M.A. 83, 23 C.M.R. 307 (1957). As the Court stated, ". . . the authority of a fiscal agent of the Federal Government acting under a separate law to pay or not to pay the accused is a matter which cannot be tossed into military law to befuddle sentences authorized by the Code." *Cleckley* at 309.

Further, petitioner's entitlement to dependent military benefits was/is contingent upon her remaining married to her husband, a military retiree. Should they divorce, she will lose the vestigial benefits the members apparently intended her to retain following her almost twenty years of exemplary service. As reflected in her unsworn statement, there have been difficulties in the marriage, Record 92; although at the time of trial, counseling had improved their relationship, Record 93, a divorce between the two remains a distinct possibility. Should this occur, petitioner will lose the military benefits the members obviously thought her deserving of.

If the rule avoiding consideration of collateral consequences without the consent of the accused had been followed in the instant case, the members would have been forced to decide whether petitioner was deserving of military benefits based upon **her** service record and the offense she committed. They would not have been allowed to avoid this issue by defaulting to her status as a dependent wife. As it were, the military judge effectively allowed the members to decide whether to dismiss the petitioner, based not upon her service record, but upon that of her husband. This was plain error. See *United States v. Grady*, 30 M.J. 911, 916-917 (A.C.M.R. 1990) (military judge erred in apparently constructing a sentence with sufficient time in confinement to ensure appellant would be confined at Ft. Leavenworth based upon the collateral matter of drug treatment programs available there), pet. denied, 32 M.J. 197 (C.M.A. 1990).

Plain error is an obvious and substantial error having an unfair prejudicial impact on a jury's deliberations. *United States v. Fisher*, 21 M.J. 327, 328-29 (C.M.A. 1986). In the instant case, the military judge completely ignored extant precedent stating that members' questions involving collateral consequences are generally not to be answered; if they are, permisison from the defense must be obtained first. Failing entirely to address this requirement of obtaining the accused's consent, the Air Force Court found no plain error because the military judge's response was substantively correct and defense counsel requested no further instruction. Though the Court of Appeals for the Armed Forces recently declined to find plain error after a defense counsel failed to object to a proposed sentencing instruction on vested Veterans Affairs benefits, the defense counsel in that case had the opportunity to object before the instruction was given to the members. *United States v. McElroy*, 40 M.J. 368 (C.M.A. 1994). Further, the *McElroy* court again affirmed the general rule that instructions on collateral ad-

ministrative consequences should be avoided. *McElroy* at 372.

The Air Force Court erred in examining the accuracy (or inaccuracy) of the Judge's pronouncement of the collateral information as the Court's approach overlooked the real feature at issue: the information is **collateral** and, by definition, irrelevant (and therefore inadmissible, Mil. R. Evid. 402). Members are generally precluded from considering collateral consequences because they are not a germane consideration to the issues at hand, not because the information can be accurately presented to the court-martial. Whether petitioner might in some other way indirectly qualify for military benefits that a dismisal would deprive her of was not an appropriate concern for the panel as they were tasked with deciding an appropriate punishment for this accused and her offense.

Against the black and white background of *Griffin*, the error of the military judge is plain. The military judge pronounced in absolute terms that the petitioner would be able to use BX, Commissary benefits, etc. though he failed to account for possible action by other authorities to deny petitioner access to such benefits. Further, the error is substantial in that it led to an improper foundation for decision of the only issue in the case: petitioner's sentence. The unfair, prejudicial impact on the members' deliberations is evident from their termination of an outstanding career spanning almost tweny years, based not upon the merits of that career, but upon the retirement eligibility of another to whom petitioner may not ultimately remain married.

CONCLUSION

The military judge committed plain error that had an unfairly prejudicial impact on her case. Despite a rule specifying that a courts-martial panel not be informed of collateral consequences associated with adjudged sentences, the military judge told the panel in the case *sub judice* that petitioner's conviction and sentence would not affect any benefits she would be entitled to as a dependent of a retired military member. Only after the judge violated this long-standing prohibition on discussing collateral consequences did he ask counsel if they "had any quarrel with that point of view." Though neither counsel objected, the information was already before the panel, having issued forth from the military judge himself. The panel was required to concern itself "with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration." In giving the panel impermissible information, the military judge committed an obvious and substantial error. The record of trial demonstrates the resulting unfair prejudice to the petitioner from this plain error. Having come within four months of being eligible to retire from the United States Air Force, petitioner put on a strong sentencing case. The panel then entered its closed session deliberations, but after one hour, returned to open court to ask the military judge what impact a dismissal would have upon petitioner's benefits as a dependent of a retiree. After hearing the military judge's answer, the panel resumed their deliberations, reaching a sentence in twenty-nine minutes—a dismissal from the Air Force. The nature of the deliberations and the sentence announced indicate the petitioner has met her burden of showing that an obvious, substantial error took place in her August 1994 trial and that the error of the military judge had an unfairly prejudicial impact on her case.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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